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FILE COPY

No. 413

IN THE

Supreme Court of the United States

October Term, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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September, 1940

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STATUTES AND CASES CITED

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Continental Oil Company, Petitioner herein, respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered August 19, 1940 (R. p. 1696); rehearing denied July 31, 1940 (R. p. 1695).

STATEMENT

The judgment of the Circuit Court is for the enforcement (with exceptions not material here) of an order entered by the Respondent, National Labor Relations Board, against the Petitioner, Continental Oil Company, on May 9, 1939 (R. p. 36) in a proceeding brought under the National Labor Relations Act (49 Stat., 449).

The Petitioner was carrying on an oil-producing busi-

ness in the Big Muddy Field and in the Salt Creek Field, and an oil refinery business in the Town of Glenrock, all in the State of Wyoming. The proceedings involved all three of these operations. Prior to the consideration of the case by the Circuit Court Petitioner ceased operating in the Salt Creek Field, and because of this the Circuit Court, by its judgment and decree, neither enforced nor set aside the Board's order as to Salt Creek Field (R. p. 1699), thus leaving in the case only the judgment of the court in so far as it will enforce the Board's order as to the Big Muddy Field and the Glenrock Refinery.

The case before the Labor Board involved a consolidation of a petition for investigation and certification of representatives under Section 9 (c) of the Act as to the Salt Creek Field (R. p. 95) with an amended complaint involving the Salt Creek Field, the Big Muddy Field and the Glenrock Refinery, based upon charges filed by the Oil Workers International Union and alleging unfair labor practices in violation of Section 8, subsections (1), (2), (3) and (5), of the Act. The amended complaint was filed February 25, 1938 (R. p. 96). A hearing was had before a Trial Examiner designated by the Labor Board at Casper, Wyoming, on March 3, 1938, to March 17, 1938, inclusive (R. p. 121). On May 11, 1938, the Trial Examiner filed his intermediate report finding all the issues against the Petitioner (R. pp. 118 to 152).

The Board entered its "Decision, Order and Direction of Election" (hereinafter referred to as the Board's Order) on May 9, 1939 (R. p. 36).

On May 25, 1939 (R. p. 1) Petitioner filed its petition with the United States Circuit Court of Appeals for the Tenth Circuit to review the Board's Order of May 9, 1939. On July 10, 1939, the Board filed with the Circuit Court its answer to the petition for review and its request for the enforcement of the Board's Order (R. p. 20).

It is to the judgment of the Circuit Court ordering the enforcement of the Board's Order (except in particulars not material here) to which this Petition for Writ of Certiorari is directed.

The particular portions of the judgment to which this Petition for Writ of Certiorari is directed are:

(1) The enforcement of the Board's Order directing Petitioner to reinstate Ernest Jones to the position formerly held by him as an employee (R. p. 1698).

(2) The enforcement of the Board's Order directing Petitioner to reinstate F. D. Moore to the position formerly held by him as an employee (R. p. 1698).

(3) The enforcement of the Board's Order directing the Petitioner to reimburse said Ernest Jones for any loss of pay or other pecuniary loss he has incurred since the date of the termination of his employment up to the time of offer of reinstatement (R. p. 1698).

(4) The enforcement of the Board's Order directing the Petitioner to reimburse said F. D. Moore for any loss of pay or other pecuniary loss he has incurred since the date of the termination of his employment up to the time of offer of reinstatement (R. p. 1698).

(5) That portion of subdivision 2 (e) of the judgment (R. p. 1698) with reference to reimbursing Jones and Moore reading:

> "deducting, however, from the amount otherwise due to each employee monies received by said employee during said period for work performed upon Federal, State county, municipal, or other work relief projects and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects; * * * * * *"

With reference to the above five numbers the charge and the finding of the Board were that in April, 1936, the Petitioner had discharged Jones and Moore for union reasons in violation of the Act. They were employees of Petitioner in Big Muddy Field. The record shows that it was necessary for business reasons to reduce the number of employees in Big Muddy Field at this time by four. Instead of discharging four employees to accomplish this re-

duction in working force, Petitioner transferred four employees to other fields in which it operated. Moore and Jones were ordered transferred to the Petitioner's Hobbs, New Mexico, Field. Jones absolutely refused the transfer and quit his employment, and within ten days thereafter purchased a general merchandise store at Parkerton, Wyoming, which he has at all times since operated as proprietor thereof. Jones was also appointed United States postmaster at Parkerton, Wyoming, which position he has held since shortly after he quit his employment with Petitioner (R. p. 57).

Moore likewise refused the transfer to Hobbs, New Mexico, and gave as the reason for his refusal the illness of his wife. Upon verifying this illness, the Petitioner changed the order of transfer to a field near Fort Collins, Colorado, which Moore also refused. Thereupon, and within a day or two after the transfer order, the Petitioner offered to reinstate Moore in his job at the Big Muddy Field, but the Board found upon Moore's testimony that this reinstatement in the Big Muddy Field was to be only for the duration of his wife's illness. Moore refused the reinstatement offer under such conditions (R. p. 53). Moore's wife was still ill at the time of the hearing two years later in March, 1938. Moore's wage with the Petitioner was $112.50 per month, without room or board. Shortly after Moore quit his employment with the Petitioner he secured a position as guard at the Wyoming State Penitentiary at Rawlins, Wyoming, which position he still held at the time of the hearing at a wage of $70 per month, plus room and board.

(6) At the Glenrock Refinery the Petitioner had eighty employees. The Board found that Local 242 of the Oil Workers International Union was the exclusive bargaining agency of these eighty employees as the result of a petition signed by forty-six of these eighty employees in July, 1935 (R. p. 57).

The record shows that in May and June of 1937, forty-seven of the Refinery employees organized an independent union known as the Independent Association of Conoco

Glenrock Refinery Employees. The Board found that the formation of this independent union was fostered by the Petitioner and has ordered the Petitioner to withdraw all recognition from it and to bargain exclusively for all employees with Local 242 of the Oil Workers International Union. It will be noted that the basis of the finding and order as to the exclusive bargaining powers of the Oil Workers International Union is the petition signed in July, 1935. The amended complaint in the proceeding before the Board was not filed until February, 1938 (R. p. 96). The Trial Examiner's intermediate report was dated May 11, 1938 (R. p. 118). The Board's Order was dated May 9, 1939. The judgment of the Circuit Court enforcing that order was entered August 19, 1940.

The evidence (R. p. 1614) discloses that Local 242, which the Petitioner has been ordered to exclusively recognize, out of eighty employees at the Refinery had only twelve members in July, 1935, which was the maximum number from that time to the time of the hearing before the Trial Examiner, and that the membership dwindled from the twelve to as low as three in July, 1936, and to only four from July, 1937, to and including February, 1938.

The July, 1935, petition to Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America (Board's Exhibit No. 49) which the Board found constituted a designation of Local 242 of the Oil Workers International Union as the exclusive bargaining agency for the eighty Refinery employees continuously from that time on, with the exception of the signatures of the forty-six employees thereto, reads as follows: (R. p. 1460 and 1461).

> "We the employes of the Contential Oil Company Company at Glenrock Refinery constituting a substantial majority of the total working forces in the verious departments have organized ourselves into Local union No. 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America, in pursuance of the right of self-organization as guaranteed in the Wagner-Connery Labor Disputes Bill.

"Through this organization and our duly designated and authorized representatives and officers, we desire to make a collective bargain with our employer, as authorized by the law, and we do not want to make individual bargains with respect to these matters.

"We therefore respectfully request a conference with representatives of the managment at its earliest convenience to begin negotiations to work out a collective bargain and to agree on terms of employment and orderly methods of settling differences in the relation between managment and employer.

"In case the Company questions the right of the representatives of the International Association of Oil Field, Gas Well and Refinery Workers of America to speak for the undersigned employes in matters of collective bargaining, we hereby petition the Labor Disputes Board to conduct an election to determine the choice of the employes of representatives for the purpose of collective bargaining."

Attention is invited to the form of this petition and the request therein for an election.

It will be noted that the effect of the Board's order to be enforced by the court judgment is to require the Petitioner to bargain exclusively with the union having a membership of four employees as the exclusive bargaining agency for eighty employees, and this is based upon the above quoted petition to Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America executed five years before the court judgment and four years before the entry of the Board's Order.

In this subdivision, as well as in the following subdivision No. 7, we have underscored the names, "Oil Workers International Union" and "International Association of Oil Field, Gas Well and Refinery Workers of America." A question of identity of these unions is involved which is covered by subdivision No. 8 of this Statement.

7. As to Big Muddy Field, the Board also found that

since August 12, 1935, Local 242 of the Oil Workers International Union had been the exclusive bargaining agency of the production employees in the Big Muddy Field. This finding was based upon Board's Exhibit 29 (R. p. 1435), being a petition similar in form to the Glenrock Refinery petition quoted above naming Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America, signed by twenty-eight out of thirty-eight of the production employees in this field. However, the Union's membership list (Respondent's Exhibit 8, R. p. 1614) shows that this union had only nine members in this field in August, 1935, and that this number had dwindled to four in February, 1938, the time of the hearing before the Trial Examiner.

Specific attention is then called to Respondent's Exhibit 20 (R. pp. 1647 and 1648) which, with the exception of the signatures of the sixteen employees thereto, reads as follows:

> "We, the undersigned employes of the Continental Oil Company, hereby notify aforesaid Continental Oil Company that we have formed ourselves into an association of the Production Department employees of Continental Oil Company in the Big Muddy field as provided under the Wagner Labor Relations Act and have appointed Roy Jones, I. H. Oneal and R. P. Peterson as a temporary Committee to represent us in negotiating with the Company under said act until a permanent Committee has been duly appointed."

This notice or petition was executed in June, 1937, and clearly evidences the formation of a labor organization or union. There was no charge or finding that this labor union was company-fostered or dominated. This notice was executed by sixteen out of the twenty-one employees then working in this field. This independent union has been absolutely ignored in the Board's findings and in the court's decree. Notwithstanding the fact that this independent union had as its members eighty per cent of the twenty-one employees and that no charge of company-domination was filed as against this independent union, the Board's order

which will be enforced by the court decree requires the Petitioner to deal with Local 242 of the Oil Workers International Union, with a membership of four, as the exclusive bargaining agency of the twenty-one employees, and this order is based upon the petition directed to Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America in August, 1935, whereas the independent union, as the evidence clearly shows, was formed by the voluntary action of eighty per cent of the employees in June, 1937.

8. As pointed out above, the charges in this case against the Petitioner filed with the National Labor Relations Board were made by Oil Workers International Union (R. p. 92). The charges as well as the complaint issued by the Board against Petitioner (R. p. 96), allege violation of the provisions of the Act by the Petitioner as against the Oil Workers International Union. As to Big Muddy Field the complaint alleged (R. p. 99) that the Oil Workers International Union was at all times since August 12, 1935, the representative of a majority of the employees. The same charge was made as to the Glenrock Refinery employees (R. p. 101).

During the course of the hearing before the Trial Examiner the Board made an oral amendment to its amended complaint (R. p. 116) alleging that the Oil Workers International Union and the International Association of Oil Field, Gas Well and Refinery Workers of America were one and the same union, with a change of name made on June 12, 1937, only involved. The Petitioner put this allegation in issue by formal answer filed thereto (R. p. 116).

The Board found (R. p. 41), and the court's judgment will enforce that finding, that the Oil Workers International Union is a CIO union and that prior to June, 1937, it bore the name of International Association of Oil Field, Gas Well and Refinery Workers of America and that it asumed its present name of Oil Workers International Union at a convention held in Kansas City, Missouri, in June, 1937.

The Board's finding and order of exclusive representative rights of Local 242 at both the Big Muddy Field and the Glenrock Refinery is based upon petitions in July, 1935, signed by a majority of the employees in these two units in form which is quoted in subdivision No. 6 of this Statement. It is not disputed that at the time these petitions were signed the International Association of Oil Field, Gas Well and Refinery Workers of America was an affiliate of the Amercian Federation of Labor.

The record shows that a convention of the International Association of Oil Field, Gas Well and Refinery Workers of America was held in Kansas City, Missouri, in June, 1937 (R. p. 41). At this convention, among other things, a resolution was adopted purporting to change the name to Oil Workers International Union.

The constitution and by-laws of the International Association of Oil Field, Gas Well and Refinery Workers of America (R. pp. 1549-1551) expressly show affiliation with the American Federation of Labor and expressly provide (R. p. 1551): "No person shall be granted membership in this organization who is opposed to the teachings and principles of the American Federation of Labor, * * * *." As shown by this constitution and as is judicially known, the American Federation of Labor is founded upon the principle of craft unionism.

At the June, 1937, Kansas City convention resolutions were adopted (R. pp. 1543-1553) not only changing the name to Oil Workers International Union but also changing the constitution so as to provide for industrial unions instead of craft unions, and otherwise committing the membership to the CIO principles.

Until the complaint in this action was filed the record shows that all dealings of the Petitioner with Local 242 were prior to the Kansas City convention in June, 1937. The record is silent as to the authority of the delegates to the Kansas City convention in June, 1937, to vote any change of affiliation from the AF of L Union to the CIO

Union. The record does not show that the membership of Local 242 ever had an opportunity to accept or reject membership in the organization created by the change in constitution at the Kansas City convention. The charges in this case upon which the Petitioner was found guilty were unfair labor practices and failure of recognition as to the Oil Workers International Union, and not as to the International Association of Oil Field, Gas Well and Refinery Workers of America.

BASIS OF JURISDICTION OF THIS COURT

The basis upon which it is contended that this court has jurisdiction to review the judgment of the Circuit Court of Appeals is Section 10 (e) of the National Labor Relations Act (49 Stat. 449), and Section 240 of the Judicial Code, as amended, (U.S.C., Title 28, Sec. 347).

THE QUESTIONS PRESENTED AND THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In making the following statement of the questions presented and the reasons relied on for the allowance of the writ we will follow the numbered subdivisions 1 to 8 set forth above in the Statement. Authorities relied on are cited in the Brief.

Question 1

Where an employee (Ernest Jones) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses to accept such transfer and quits his employment, does the National Labor Relations Board have the power to order such employee's reinstatement to his former position where it appears that immediately after the cessation of his employment he purchased, and at all times since has operated, a general merchandise store as proprietor thereof in addition to acting as United States postmaster? If such power in the Board exists, is it an abuse of discretion to order such reinstatement?

Question 2

Where an employee (F. D. Moore) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses such transfer on account of the alleged illness of his wife, and the employer, after verifying such illness, within a day or two after the transfer order offers the employee reinstatement to his old position "for the duration of his wife's illness," which offer the employee refuses and thereupon quits his employment from which he was receiving a wage of $112.50 per month (without room and board) and accepts and retains employment at the Wyoming State Penitentiary at a wage of $70 per month, plus room and board, and it appears that at all times up to the hearing before the Trial Examiner of the Labor Board the wife's illness continued, does the Board have the power to order such employee's reinstatement, or, if such power exists, is it an abuse of discretion to order such reinstatement?

Question 3

Does the Board have the power, under the facts outlined in Question 1, to order the employer (Petitioner) to reimburse the employee (Ernest Jones) for pecuniary losses he may have sustained in the conduct of his general merchandise store, or, if such power exists, did the Board abuse its discretion in ordering such reimbursement?

Question 4

Does the Board have the power, under the facts outlined in Question 2, to order the employer (Petitioner) to reimburse the employee (F. D. Moore) for pecuniary losses he may have sustained between the date he quit his employment and the date of offer of reinstatement? In any event, should not the reimbursement be limited to a period terminating at the time when he was offered reinstatement "for the duration of his wife's illness"?

Question 5

The Board's Order requiring reinstatement of employees Moore and Jones, with reimbursement, provides:

"deducting, however, from the amount otherwise due to each employee monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work relief projects and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects; * * * * *."

Even assuming the order of reinstatement and reimbursement to be proper, does the Board have the power to require the Petitioner, as employer, to comply with the above quoted portion of its reimbursement order, or, if it has such power, did it abuse its discretion in so ordering in this case?

Reasons Relied on For the Allowance of the Writ as to Questions 1, 2, 3, 4, and 5

(a) The decision of the Circuit Court of Appeals in this case in ordering the reinstatement of Ernest Jones and F. D. Moore under the circumstances outlined in the above questions and in ordering reimbursement for pecuniary losses up to the time of the offer of reinstatement is in conflict with the decisions of other Circuit Courts of Appeal on the same matters, viz.; the Board has no power to order reinstatement and no power to order reimbursement unless the status of employee exists at the time of the entry of the Board's order and unless the employee has not, in the meantime, obtained any other regular and substantially equivalent employment.

(b) In ordering the reinstatement of Ernest Jones and F. D. Moore under the circumstances outlined in the above questions and in ordering reimbursement for pecuniary losses sustained prior to offer of reinstatement, the Circuit Court has decided federal questions in a way probably in conflict with applicable decisions of this court which has held that the authority of the Board to require affirmative action is remedial and not punitive.

(c) If it should be considered that the decisions of this court referred to in subdivision (b) supra are not controlling, then the Circuit Court in this case has decided im-

portant questions of federal law which have not been, but should be, settled by this court.

(d) With further reference to the point raised in Question 5, conflicting decisions have been rendered by the various Circuit Courts and this question is now pending before this court in the case of *Republic Steel Corp. v. NLRB*, 107 Fed. (2d) 472 (3); certiorari granted 60 S. Ct. 1072.

Question 6

Where it appears that in July, 1935, forty-six out of eighty Refinery employees designated a particular union as their bargaining agency, and thereafter, and in May and June of 1937, forty-seven of the Refinery employees organized an independent union which the Board has found to be company-fostered and dominated, and no complaint of unfair labor practice is issued against the employer until February, 1938, and it appears that the union designated in July, 1935, had only twelve members at that time and that its membership had dwindled to four in February, 1938, does the Board have the power, by its order entered on May 9, 1939, with the Circuit Court's enforcing judgment entered August 19, 1940, to require the Petitioner to recognize the union, with only four members, as the exclusive bargaining agency for its eighty Refinery employees? If such power exists, was it an abuse of discretion upon the part of the Labor Board and the Circuit Court to require such exclusive recognition without at least ordering an election to be held by the Refinery employees to determine their present choice of a bargaining agency?

Reasons Relied on For Allowance of Writ as to Question 6

(a) The decision of the Circuit Court of Appeals in this case, in ordering the Petitioner to deal exclusively with Local 242 based upon the July, 1935, petition and in not at least ordering an election to determine the present choice of the employees is in conflict with the decisions of other Circuit Courts of Appeal under similar situations.

(b) In ordering the Petitioner to deal with Local 242, having a membership of four, as the exclusive bargaining agency for the eighty Refinery employees the Circuit Court has decided a federal question in a way probably in conflict with applicable decisions of this court, which has held that the authority of the Board to require affirmative action is remedial and not punitive.

(c) If it should be considered that the decisions of this court referred to in subdivision (b) supra are not controlling, then the Circuit Court in this case has decided an important question of federal law which has not been, but should be, settled by this court.

Question 7

Where it appears that in August, 1935, twenty-eight out of thirty-eight production employees in the Big Muddy Field designated Local 242 as their bargaining agency, and that the Petitioner bargained with that union, it being the only union in the field, but the Board has found that the Petitioner commited an unfair labor practice in stating that it did not recognize that local as the bargaining agency except for its own members, does the Board have the power by an order entered in May, 1939, to be enforced by the Circuit Court's judgment entered in August, 1940, to require the Petitioner to recognize Local 242 as the exclusive bargaining agency in the field, where it further appears that in August, 1935, Local 242 had only nine members in this field and that its membership had dwindled to four in February, 1938, the time of the hearing before the Trial Examiner, and where it further appears that in June, 1937, sixteen out of the twenty-one employees then working in the field formed an independent union against which no charge of company domination has been made? If the Board had such power, was it an abuse of discretion to so order under the above circumstances without at least requiring an election to determine the present choice of the employees as to their bargaining agency?

Reasons Relied on For the Allowance of Writ as to Question 7

(a) Petitioner relies on each of the reasons stated

above in connection with Question 6.

(b) The Circuit Court, in ordering exclusive recognition of Local 242, with no charge of company domination having been made against the independent union organized in June, 1937, and without at least requiring an election, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the National Labor Relations Board, as to call for an exercise of this court's power of supervision.

Question 8

Where at the time a local union acquires exclusive representative rights for a particular unit it is a member of a national union which is an affiliate of the American Federation of Labor, has the Board the power to require the Petitioner thereafter to deal exclusively with a local union of the same name where it appears that by change in its constitution the national union not only changed its name but also withdrew its allegiance from the American Federation of Labor and declared its allegiance to the Committee for Industrial Organization, and where it does not apear that the members of the local voted for or authorized such change of affiliation, and where it further appears that all acts charged against Petitioner as being unfair labor practices as against the local occurred prior to the change of affiliation and the union did not seek to bargain with the Petitioner subsequent to the change of affiliation and prior to the filing of charges with the Labor Board? Under such circumstances can it be said that the local union, which was an affiliate of the American Federation of Labor, and the present local union, which is an affiliate of the Committee for Industrial Organization, are one and the same union? If the Board had the power to order such recognition, did it abuse its discretion in doing so without at least ordering an election to determine the present choice of the employees as to their bargaining agency?

Reasons Relied on For the Allowance of Writ as to Question 8

Petitioner relies on each of the reasons stated above in connection with Questions 6 and 7.

WHEREFORE, for the above reasons, supported by the brief appended thereto and the argument and citation of authorities contained therein, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

CONTINENTAL OIL COMPANY
Petitioner

By

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUBJECT INDEX

A subject index covering this brief and the petition for writ of certiorari precedes the petition.

THE OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit in this case is reported in 113 Fed. (2) 473 (Adv. Op.). It was handed down June 13, 1940, with rehearing denied July 31, 1940. The opinion appears in the record filed herein at page 1649, et seq. The May 9, 1939, "Decision, Order and Direction of Election" of the National Labor Relations Board, which is the subject matter of this case, appears in the record at page 36, et seq., and is reported in 12 NLRB, No. 87.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered August 19, 1940 (R. p. 1696); rehearing denied July 31, 1940 (R. p. 1695). Jurisdiction of this court is invoked under Section 10 (e) of the National Labor Relations Act (49 Stat. 449) and Section 240 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 347).

STATEMENT OF THE CASE

This appears at pages 1 to 10 of the petition for writ of certiorari.

The questions presented and the reasons relied on for the allowance of the writ appear at pages 10 to 15 of the Petition for Writ of Certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The following specifications of errors are urged in connection with "The Questions Presented" as set forth in the Petition for Writ of Certiorari at pages 10 to 15.

The Circuit Court of Appeals erred:

1. In ordering the reinstatement of Ernest Jones.

2. In ordering the reinstatement of F. D. Moore.

3. In ordering the Petitioner to reimburse Ernest Jones for pecuniary losses he may have sustained in the conduct of his general merchandise store.

4. In ordering the Petitioner to reimburse F. D. Moore for pecuniary losses he may have sustained, and in any event not limiting such reimbursement to a period terminating at the time he was offered reinstatement "for the duration of his wife's illness."

5. In ordering the Petitioner to deduct from the reimbursement payments directed to be made to Moore and Jones moneys received by them for work performed upon federal, state, county, municipal or other work relief projects and to pay over the amounts so deducted to the appropriate fiscal agency of the federal, state, county, municipal or other government or governments which supplied the funds for said work relief projects.

6. In ordering the Petitioner to bargain with the Oil Workers International Union as the exclusive representative of all its employees in the Glenrock Refinery.

7. In ordering the Petitioner to bargain with the Oil Workers International Union as the exclusive representative of all its employees in the Big Muddy Field.

8. In enforcing the Board's findings that the International Association of Oil Field, Gas Well and Refinery Workers of America, an affiliate of the American Federation of Labor, and the Oil Workers International Union, an affiliate of the Committee of Industrial Organization, are identical, and that the Petitioner violated any of the provisions of the National Labor Relations Act as to the Oil Workers International Union, and in requiring the Petitioner to recognize the Oil Workers International Union as the exclusive bargaining agency at the Glenrock Refinery and in the Big Muddy Field on the basis of identity of the two unions.

ARGUMENT

A summary of the facts, together with a statement of the eight questions presented and the reasons relied on for the allowance of the writ is set forth in the Petition to which reference is hereby made. In our argument on each of the eight questions presented we will briefly summarize the facts in the respective questions as may be required.

Did the Board Have the Power to Order the Reinstatement of Ernest Jones, or Abuse Its Discretion in So Doing?

This is the question presented in Question 1 in the Petition (p. 10).

Section 10 (c) of the National Labor Relations Act (hereinafter sometimes referred to as the Act), 49 Stat. 449, provides that the Board shall have the power, where it finds an unfair labor practice, to issue an order requiring the employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

Section 2 (3) of the Act defines an employee as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

It will be noted that under Section 10 (c) quoted above the reinstatement power of the Board is limited to "employees."

In construing the reinstatement powers of the Board contained in Section 10 (c) with the definition of an em-

ployee contained in Section 2 (3) the Circuit Courts of Appeal for the Second, Third, Fourth and Ninth Circuits have held that the Board has no power to order reinstatement unless the status of an employee exists at the time of the entry of the Board's order, and unless the employee has not, in the meantime, obtained any other regular and substantially equivalent employment.

Mooresville Cotton Mills v. NLRB (4th), 94 F. (2d) 61, 66.

Standard Lime & Stone Co. v. NLRB (4th), 97 F. (2d) 531, 535.

NLRB v. Carlisle Lumber Co. (9th), 99 F. (2d) 533, 537, 538.

NLRB v. Hearst (9th), 102 Fed. (2d) 658, 664.

NLRB v. National Motor Bearing Co. (9th), 105 F. (2d) 652, 662.

NLRB v. Botany Worsted Mills (3rd), 106 F. (2d) 263, 269.

Typical of the reasoning in the above cases is the following quotation from *NLRB v. Carlisle Lumber Co.* (9th), 99 Fed. (2d) 533, 537:

> "It should be noted that only 'employees' may be reinstated. Section 2 (3) of the act, 29 U.S.C.A. sec. 152 (3), defines 'employee' to 'include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.' Respondent makes several contentions regarding the time when the men are to be considered as employees. I think that since the act provides that the Board may 'order * * * reinstatement of employees with or without back pay' before it could make such an order it would first have to determine whether or not the men were 'employees' at the time of its order. If the men were not 'employees' the Board would have no

power to order their reinstatement. Therefore, the Boafd must determine when it makes its order, whether or not the men are 'employees' at such time. The Board made a like construction of the act by its finding that the men in question had not obtained substantially equivalent employment on September 26, 1936, the date of its first order, partially enforced by our former decision.

"If any of the men did obtain such employment the 'employee' status, as respondent contends, could not be revived by their voluntarily or involuntarily ceasing such employment."

In the present case Jones refused his transfer and quit his employment at the end of April, 1936. Within ten days thereafter he purchased a general merchandise store at Parkerton, Wyoming, which he has at all times since operated as proprietor thereof, in addition to acting as United States Postmaster pursuant to appointment. He was conducting the merchandise store and acting as postmaster at the time of the hearing before the Trial Examiner in February, 1938, with no showing in the record that he was not still doing so at the time the Board entered its Order on May 9, 1939.

Clearly, one who becomes a proprietor of a merchandise store does not retain his status as an employee.

It is submitted that the decision of the Circuit Court in this case ordering the reinstatement of Jones is in direct conflict with the decisions from the other circuits above cited holding that the status of an employee must exist at the time of the entry of the Board's Order. For this reason, the Petition for Writ of Certiorari should be granted.

Again this court has held that the power of the Board to require affirmative action is remedial and not punitive. We quote Mr. Chief Justice Hughes in the following two cases :

Consolidated Edison Co. v. NLRB, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126, 143:

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purpose of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices."

NLRB v. Fansteel Metal. Corp., 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 636:

"The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in Consolidated Edison Co. v. National Labor Relations Bd. (decided December 5, 1938) 305 U. S. 197, ante, 126, 59 S. Ct. 206, we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

We submit that where an employee, although discharged in violation of the Act, thereafter voluntarily ceases to be or to attempt to be an employee of anyone, but becomes a proprietor of a business and thus enters the class of an employer, it is a gross abuse of discretion, even if underlying power might exist in the Board, for the Board to order

the reinstatement of such former employee. Such an affirmative order is punitive and not remedial, and necessarily violates the rules laid down by this court in the Consolidated Edison and Fansteel cases supra, and similar cases.

As a second ground for granting the writ, therefore, we submit that the decision of the Circuit Court in this case is in conflict with the above applicable decisions of this court.

As a third ground for granting the writ, we respectfully submit that if it be considered that the Consolidated Edison and Fansteel decisions of this court and similar decisions are not directly controlling, nevertheless the proposition presents an important question of federal law which should be settled by this court. A serious question as to the extent of the power of the Board is presented. This question should be determined so that employer, employee, the public, and the Board alike will know where they stand with reference to this very important question involving the reinstatement of former employees. Particularly is the question important where the former employee has become a proprietor himself.

Did the Board Have the Power to Order the Reinstatement of F. D. Moore, or Abuse Its Discretion in So Doing?

This is the question presented in Question 2 in the Petition (p. 11).

Reference is made to the authorities cited and quoted in the immediately preceding subdivision of this Brief.

Moore at the time he refused reinstatement as an employee in the Big Muddy Field, as found by the Board "for the duration of his wife's illness" was earning $112.50 per month without room or board (p. 4). Shortly thereafter he secured a position as guard at the Wyoming State Penitentiary at Rawlins, Wyoming, which position he still held at the time of the hearing at a wage of $70 per month, plus room and board. This employment so secured at the penitentiary, we submit, constituted "other regular and substan-

tially equivalent employment," as contemplated by Section 2 (3) of the Act quoted above, and consequently Moore was not an employee at the time of the Board's order, entitled to reinstatement under Section 10 (c) of the Act.

The decision of the Circuit Court, in enforcing this part of the Board's Order, is in conflict with the decisions of the other circuits cited in the previous subdivision hereof.

The action of the Board, in ordering this reinstatement, is clearly punitive and not remedial, and if basic power to order such reinstatement shall be held to exist in the Board, then exercise of that power under the circumstances disclosed is clearly an abuse of discretion.

Did the Board Have the Power to Order Reimbursement of Ernest Jones For Pecuniary Losses He May Have Sustained in the Conduct of His General Merchandise Store, or Abuse Its Discretion in So Doing?

This is the question presented in Question 3 in the Petition (p. 11).

Within ten days after Jones refused his transfer to Hobbs, New Mexico, and quit his employment at the Big Muddy Field he purchased a general merchandise store at Parkerton, Wyoming, which he was still operating, as proprietor thereof, at the time of the hearing before the Trial Examiner. In addition to this, he was United States postmaster pursuant to appointment.

Subdivision 2 (e) of the Judgment of the Circuit Court (R. pp. 1698-1699) reads:

> "Make whole Ernest Jones and F. D. Moore for any loss of pay or any other pecuniary loss they may have suffered by reason of Continental Oil Company's acts by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from the date of the termination of his employment to the date of Continental Oil Company's offer of reinstatement, less his net earnings during that period, deducting, however from the

amount otherwise due to each employee monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work relief projects and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects. If an accounting shall be necessary or requested by the petitioner, Continental Oil Company, or by the said Ernest Jones or F. D. Moore in order to determine the exact amount of money due said Ernest Jones and the said F. D. Moore, or either of them, such accounting shall be had under the direction of the National Labor Relations Board, and thereupon a subsequent order shall be entered by said Board awarding the precise sum, if any, due in each instance;"

We find no case, either in this court or the Circuit Courts, involving a reimbursement order where the former employee has become a proprietor of a mercantile business and the former employer has been ordered to reimburse him for the loss he may have sustained in the conduct of that business up to the amount he would have earned had he remained an employee of the Petitioner. Clearly, the Circuit Court's judgment in this respect is in conflict with the decisions cited above (p. 20) holding that the status of an employee must exist at the time of the Board's order to justify an order of reinstatement. No reimbursement is justified without reinstatement. If on any theory reimbursement in any case is justified in the absence of reinstatement or an offer of reinstatement, there is no power found in the Act authorizing the Board to require an employer to subsidize a business enterprise in which the former employee may have chosen to venture. Such an order is clearly punitive and not remedial and within the condemnation of the decisions of this court in the cases cited above (p. 21).

If it should be considered that this situation is not controlled by the decisions of this court cited above or in conflict with the decisions of the other Circuit Courts

cited above, then it is respectfully submitted that the question presented is an important question of federal law which has not been, but should be, settled by this court.

Did the Board Have the Power to Order Reimbursement of F. D. Moore for Pecuniary Losses He May Have Sustained or Abuse Its Discretion in So Doing, and in Any Event Should Not Any Reimbursement be Only for the Period Which Terminated at the Time He Was Offered Reinstatement "For the Duration of His Wife's Illness"?

This is the question presented in Question 4 of the Petition (p. 11).

Moore was ordered transferred to Hobbs, New Mexico, on April 26th or April 27th, 1936 (R. p. 427). He refused the transfer because of his wife's alleged illness. Within five or six days thereafter he was offered his old job back in the Big Muddy Field, but the Board found that this offer of reinstatement was "for the duration of his wife's illness" (R. p. 53, 427).

In subdivision 2 (d) of the judgment (R. p. 1698) the Circuit Court has ordered the Petitioner to offer Moore immediate and full reinstatement to the position formerly held by him in the Big Muddy Field.

In subdivision 2 (e) of the judgment quoted above the Circuit Court has ordered the Petitioner to reimburse Moore "from the date of the termination of his employment to the date of Continental Oil Company's offer of reinstatement."

As grounds for the Writ of Certiorari we urge the same reasons as stated above with reference to the order of reimbursement of Jones, namely; the conflict with the decisions of other Circuit Courts, the conflict with the decisions of this court holding that the Act is remedial and not punitive, and the importance of the question involved, if it should be held that the point is not covered by the decisions of this court or conflict with the decisions of the other Circuit Courts.

In addition to the above, we specifically urge that this particular order is beyond the power of the Board or, if within the power, it shows an abuse of discretion in that the order will require reimbursement from the date of the termination of Moore's employment up to the time in the future when the Petitioner may make some new offer of reinstatement to Moore. The evidence and the Board's finding (R. p. 53, 427) clearly show that the Petitioner did offer reinstatement to Moore within five or six days after Moore refused his transfer to Hobbs. It is true that the Board has found that that offer of reinstatement was only for the duration of his wife's illness. That illness was still continuing at the time of the hearing before the Trial Examiner (R. pp. 436, 437, 438). Any loss which Moore may have sustained subsequent to this offer of reinstatement is certainly the result of his refusal to accept the reinstatement. That loss would not have been sustained had he accepted the offer of reinstatement. To compel the Petitioner at this time to make a new offer of reinstatement and to reimburse Moore for his losses up to the time of the new offer of reinstatement is clearly punitive and not remedial. It is beyond the power of the Board, or, if it should be held within its basic power, its exercise under the circumstances disclosed was clearly an abuse of discretion.

Did the Board Have the Power to Require Deduction From Reimbursement Moneys Ordered Paid to Jones and Moore Moneys Paid Them by Federal and Other Governmental Relief Agencies and to Require Petitioner to Pay Such Deducted Moneys to the Relief Agencies? If Such Power in the Board Exists, Did it Abuse Its Discretion in Making Such Order?

This is the question presented in Question 5 in the Petition (p. 11).

At pages 11-12 of the Petition and at page 24 of this Brief we have quoted the portion of subdivision 2 (e) of the judgment (R. p. 1698) to which this question is directed. The Petitioner is required to deduct from moneys which may be found due Jones and Moore under the reimburse-

ment order amounts which they may have received for work performed upon federal and other governmental relief projects and to pay such amounts to the appropriate federal or other governmental relief agency which supplied the funds for the relief projects.

There is certainly no express authority in the Act for any such order. Under certain circumstances the Board has the power to order reimbursement of a discharged employee, but there is nothing in the Act which permits the Board to require an employer to make whole any third person, whether it be a governmental agency or otherwise, who has sustained some loss because of the discharge of the employee. Presumptively, any federal or other governmental agency for which such employee might have worked got value received for any payments made by it. There is no reason in law or equity why a former employer, irrespective of the reason for the discharge, should be required to pay the wage of an employee of the federal government or any other governmental agency for services rendered to such governmental agency. There is no justification in law or equity for making a collection agency out of the employer to collect money for a governmental agency. Such is our objection to this portion of the Board's order. We claim it is penal in character, beyond the power of the Board, or an abuse of discretion if within the power of the Board.

There is a direct conflict on this question in the decisions of the various circuits. The Second Circuit, in *NLRB v. Leviton Mfg. Co.*, 111 Fed. (2d) 619, 621 (Adv. Op.), and the Ninth Circuit, in *NLRB v. Tovrea Packing Co.*, 111 Fed. (2d) 626 (Adv. Op.), have refused to order enforcement of such provision as being invalid, and so also, we are informed, the Seventh Circuit in the case of *M. H. Ritzwoller v. NLRB*, decided July 16, 1940 (unreported); while the First Circuit, in *NLRB v. Somerset Shoe Co.*, 111 Fed. (2d) 681 (Adv. Op.), and the Third Circuit, in *Republic Steel Corp. v. NLRB*, 107 Fed. (2d) 472, and in *Union Drawn Steel Co. v. NLRB*, 109 Fed. (2d) 587, have approved such provision.

This court has granted certiorari and assumed jurisdiction of this question in the case of *Republic Steel Corp. v. NLRB, supra*, 107 Fed. (2d) 472; certiorari granted 60 S. Ct. 1072, 84 L. Ed. 902.

It is submitted that the conflict in the Circuit Court decisions and the assumption of jurisdiction of this question by this court justifies the issuance of a writ of certiorari in the present case.

Did the Board Have the Power to Order Petitioner to Deal With the Oil Workers International Union as the Exclusive Bargaining Agency at Either the Glenrock Refinery or the Big Muddy Field, Or, If It Had Such Power, Did It Abuse Its Discretion in Making Such Order Without Requiring an Election to Determine the Present Choice of the Employees as to Their Bargaining Agency?

These are questions presented in Questions 6 and 7 in the Petition (pp. 13 and 14).

As shown in the Statement (p. 5), the Board's Order requiring exclusive recognition of the Oil Workers International Union at the Refinery is based upon a petition directed to Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America, executed in July, 1935, by forty-six out of eighty employees. In June, 1937, forty-seven out of the eighty employees organized an independent union which the Board has found to be company-dominated and has ordered its disestablishment as a bargaining agency. The complaint against the Petitioner was filed in February, 1938; the hearing was had in March, 1938; the Board's Order was entered in May, 1939; and the court's enforcement order in August, 1940. Five years have elapsed since the July, 1935 petition was signed which forms the basis of the Board's exclusive recognition order.

Local 242 had only twelve members in July, 1935. Its membership had dwindled to three in July, 1936, and was only four at the time of the hearing in 1938.

In the Big Muddy Field (see Statement, p. 7, et seq.) the Board likewise ordered Petitioner to deal exclusively with Local 242 based upon the petition signed in August, 1935, by twenty-eight out of thirty-eight employees.

In June, 1937, sixteen out of the twenty-one employees then working in this field formed an independent union. (See Statement, p. 7, et seq.) No charge of any kind against this union or against the Petitioner on account of its formation or existence has been made. No finding has been made that it was company-fostered or dominated. It has been completely ignored in the Board's order and the court's judgment.

Local 242 had only nine members in this field in August, 1935, and this number had dwindled to four in February, 1938. It will be seen that the effect of the judgment is to require the Petitioner at the Glenrock Refinery to bargain exclusively with a union having only four members for its eighty employees. Likewise in Big Muddy Field the order and judgment will require the Petitioner to bargain with a union having only four members for its twenty-one employees. Both orders are based upon petitions signed four years before the Board's order was entered and five years before the court's judgment was entered, and this notwithstanding the formation of the independent union in the Big Muddy Field in June, 1937, against which no charge of company domination has been filed.

It is the Petitioner's position that these orders are beyond the power of the Board; that they are penal in character, and, if within the power of the Board, show abuse of discretion as they cannot possibly further the purposes of the Act.

The judgment in this respect is in conflict with the decisions of other circuits where under similar circumstances the record showed a questionable present bargaining choice of the employees and the court ordered an election to determine the present choice instead of ordering recognition based upon a majority claim secured a considerable period of time prior to the entry of the Board's order.

NLRB v. National Licorice Co., (2), 104 Fed. (2d) 655, 658.

Hamilton-Brown Shoe Co. v. NLRB, (8) 104 Fed. (2d) 49, 56.

NLRB v. American Mfg. Co., (2), 106 Fed. (2d) 61, 68.

NLRB v. Bradford Dyeing Ass'n, (1), 106 Fed. (2d) 119, 125.

Cupples Co. v. NLRB, (8) 106 Fed. (2d) 100, 117.

NLRB v. Fansteel Metal. Corp., 59 S. Ct. 490; 306 U. S. 240; 83 L. Ed. 627, 638.

We quote the following excerpts from *Hamilton-Brown Shoe Co. v. NLRB*, supra, as typical of the above decisions:

"It is more than a year and a half since the hearing was held before the Board. Prior to the filing of the transcript, a showing was made that the Union no longer represented a majority of the employees, but that 90% of them had transferred their affiliation to the Boot and Shoe Workers Union and Local 176. Yet the Board arbitrarily refused to consider or investigate this claim, but entered its order requiring the employer to recognize the Union as the exclusive bargaining representative of the employees.

* * * * * * * * * *

"* * * * * * We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it can not be assumed that the Union is now the accredited representative of the employees, but the showing made, and it stands without dispute, is at least sufficient to require investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employees to recognize the Union as

the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal. A court of equity will not do useless, unjust, or inequitable things. In re Hawkins Mortgage Co., 7 Cir., 45 F. 2d 937. Courts do not deal with abstractions. The proceedings here are substantially proceedings in equity in that equitable rules are applicable. National Labor Relations Board v. Cherry Cotton Mills, 5 Cir., 98 F. 2d 444. This court is granted power to modify orders of the Board (Section 10 (f)).

"We conclude that the order should be modified in two particulars: ********* (2) that part of the order requiring the Company to recognize only the Union as the bargaining agency of the employees is set aside and the Board directed to determine the choice of the employees by requiring an election after the status quo shall have been restored by disestablishing the company union and by the reinstatement of the wrongfully discharged employees. After the Board shall have determined the issue of representation by the holding of an election, it will then issue a certificate certifying an exclusive bargaining representative under Section 9 (c) of the Act, and enter such supplemental order or orders as may be necessary to enforce such certification. * * * * * "

We further submit that the judgment ordering exclusive recognition of Local 242 is in conflict with applicable decisions of this court.

In *NLRB v. Fansteel Metal. Corp.*, 59 S. Ct. 490, 306 U. S. 240, 83 L. Ed. 627, 638, this court said:

"Respondent resumed work about March 12, 1937. The Board's order was made on March 14, 1938. In view of the change in the situation by reason of the valid discharge of the 'sit-down' strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining. The Board's order

properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election."

National Licorice Co. v. NLRB, 60 S. Ct. 569, 84 L. Ed. (Adv. Op.) 533, 539:

"* * * * * Such injury, if any, as the petitioner might have suffered from the Board's order requiring it to recognize and bargain with the Union, is avoided by the direction of the Court of Appeals that this part of the order be conditioned upon a determination by an election that the Union is still the choice of a majority of the employees. The Board has not petitioned for certiorari and does not complain of this direction."

The Board's Order in this case was handed down May 9, 1939. Since that time the Board itself has changed its former policy and is now ordering elections under similar circumstances. We quote from *Cudahy Packing Co.*, 13 *NLRB*, No. 61, decided July 12, 1939:

"The United claims that it should be certified upon the proof offered. The Company and the Independent, however, assert that an election must be held in order to ascertain the true wishes of the employees. We are thus faced with conflicting claims as to which of two labor organizations, each designated by a substantial number of the employees involved, is entitled, under the Act, to represent all of them. Our determination of representatives looks to the initiation of collective bargaining between the Company and its employees. We believe that since each of two contesting labor organizations has proved substantial adherence among the employees the bargaining relations which result will be more satisfactory from the beginning if the doubt and

disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated. Although in the past we have certified representatives without an election upon a showing of the sort here made, we are persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot. We shall, accordingly, direct that such an election be held."

Numerous decisions of the National Labor Relations Board handed down since the Cudahy case follow this ruling.

In addition to the above, we again point out that as to Big Muddy Field the record shows that eighty per cent of the employees formed an independent union two years subsequent to the time when Local 242 claims to have secured its majority representation. No charge of any kind is made as against the independent union. Under such circumstances it is our position that the judgment of the court ordering exclusive recognition of Local 242 will enforce an order of the Board entirely beyond its power. It constitutes a denial of due process and equal protection in violation of the applicable provisions of the federal constitution to thus destroy the independent union without a charge or hearing of any kind. This, we submit, is a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this court's power of supervision.

The Question of the Identity of Oil Workers International Union and International Association of Oil Field, Gas Well and Refinery Workers of America.

This is the question presented in Question 8 in the Petition (p. 15).

As set forth in the Statement, in July, 1935, at the Refinery forty-six out of the eighty employees, as found by the Board, designated Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America as their bargaining agency.

In August, 1935, in the Big Muddy Field twenty-eight out of the thirty-eight employees then working designated this same local as their bargaining agency.

As pointed out above, in 1937 an independent union was organized at the Refinery, having forty-seven out of the eighty employees as members. This union the Board has ordered disestablished. Also in 1937 in the Big Muddy Field an independent union was formed having as its members sixteen out of the twenty-one employees then working. No charge against this union has been made. It has not been ordered disestablished.

The membership of Local 242 at the time of the hearing in March, 1938, was four at the Refinery and four in the Big Muddy Field.

The order of the Board to be enforced by the court judgment (R. p. 1697) requires the Petitioner to recognize Oil Workers International Union (not Local 242) as the exclusive bargaining agency at both the Refinery and in Big Muddy Field.

The Board's order of exclusive recognition is based solely upon the 1935 petitions referred to above. The Board found that the Petitioner had committed unfair labor practices in failing to give exclusive recognition to Local 242 based upon the 1935 petitions.

The record shows that at Glenrock Refinery this union made no attempt to bargain with Petitioner upon any matter subsequent to January 14, 1936 (R. p. 265). The record also shows that in the Big Muddy Field this union made no attempt to bargain with the Petitioner subsequent to May 8, 1936 (R. pp. 286-288).

In June, 1937, which was more than a year after the last bargaining between the union and Petitioner, and which was two years after the 1935 petitions were executed upon which the Board based its findings of unfair labor practices and orders of exclusive recognition, a convention of the International Association of Oil Field, Gas Well and Refinery Workers of America was held in Kansas City,

Missouri (R. p. 41). At this convention, among other things, a resolution was adopted purporting to change the name to Oil Workers International Union. The Board has found (R. p. 41) that the only change made at this convention was a change in name, and that continuity in organization was preserved. This, we submit, is contrary to the uncontradicted evidence in the record. At pages 1549 to 1551 of the record is set forth the constitution and by-laws of the International Association of Oil Field, Gas Well and Refinery Workers of America which shows this union to be an affiliate of the American Federation of Labor and pledged to its craft union principles, with membership limited to employees adhering to such principles. At pages 1543 to 1553 of the record appear certain proceedings had and resolutions adopted at the Kansas City convention, including changes in the constitution. It appears (R. p. 1544) that the American Federation of Labor had revoked the charter of the International Association of Oil Field, Gas Well and Refinery Workers of America. So this union was no longer an affiliate of the American Federation of Labor to which Local 242 in 1935 had directed its petitions, which petitions were found by the Board to give that local exclusive representative rights. At the convention the constitution was changed so as to give allegiance to the Committee for Industrial Organization. A new constitution was adopted (R. pp. 1551-1553) which contains a pledge to the principles of industrial organization and excludes from membership all not adhering thereto.

The Oil Workers International Union is admittedly a CIO union. The Petitioner has been directed to recognize that CIO union as the exclusive bargaining agency at the Refinery and in Big Muddy. This CIO union at no time was designated by any of the employees at either the Refinery or Big Muddy as a bargaining agency. The record shows no authority for anyone at the Kansas City convention to bind the membership of Local 242 as a CIO member or affiliate. All bargaining which the Petitioner at any time carried on with Local 242 was with it as a chartered union of the

American Federation of Labor. No bargaining of any kind has ever been carried on with the CIO. The CIO at no time requested the Petitioner to bargain; yet it was the CIO Oil Workers International Union which filed the charges against Petitioner alleging unfair labor practice as against it in failing to bargain with it, and it is this CIO union which the Petitioner is directed to recognize exclusively, based upon the representative rights found by the Board to have been vested in the American Federation of Labor union as the result of the 1935 petitions.

We submit that the court will take judicial notice that a CIO union and an AF of L union cannot be one and the same. The principles of the two organizations are diametrically opposed. It is impossible for an employee to adhere to both principles at the same time or to belong to both unions in the same employment.

The Seventh Circuit in *Jefferson Electric Co. v. NLRB*, 102 Fed. (2d) 949, 953, has taken judicial notice of the distinction between a CIO union and an A F of L union. We quote (p. 953):

> "This tripartite controversy presents a bitter contest between the Amercan Federation of Labor and the Committee for Industrial Organization, each labor organization seeking recognition as the sole and exclusive bargaining representative of the same group of employees. We take judicial notice that the recent past has brought a distinct cleavage in the American labor movement, dividing labor into warring factions and leaving in its wake unnecessary unrest and strife."

The Board itself has recognized that the Oil Workers International Union is an affiliate of CIO.

In the Matter of The Texas Company, 4 NLRB, 27.

Additional authorities showing the non-identity of an AF of L union and a CIO union and the absolute impossibility of maintaining the identity of a union where a change of affiliation is made from the American Federation of Labor are the following:

M. & M. Wood Working Co. v. Plywood & Veneer Workers Local Union (Dist. Ct., Ore.), 23 Fed. Sup. 11, 18.

Low v. Harris (7), 90 F. (2d) 783.

M. & M. Wood Working Co. v. NLRB (9), 101 F. (2d) 938, 941.

Applicable principles are also announced in:

Weighers Warehousemen, etc. Union v. Green, et al. (Ore.), 72 Pac. (2d) 55.

Hall v. Moorin (Mo.), 293 S. W. 435.

Bear v. Heasley (Mich.), 57 N. W. 270.
63 *C. J.* 662, 693.

Quoting briefly:

M. & M. Wood Working Co. v. Plywood & Veneer Workers Local Union (Dist. Ct., Ore.), 23 Fed. Sup. 11, 18:

"Thereafter, not by reason of any difficulty with plaintiff but because of disgust over the domination of certain officers of the Carpenters & Joiners Union, certain members attempted to change the unit from one affiliated with the American Federation of Labor to one controlled and chartered by the Committee for Industrial Organization. Even courts know that these two parent associations are hostile and antagonistic. Therefore, even if there had been a unanimous secession, the organization chartered by the Committee for Industrial Organization would not be the same as the original unit chartered under the auspices of the American Federation of Labor with which plaintiff had a contract. The attempt of the association chartered by the Committee for Industrial Organization to adopt that contract and to take advantage of its terms while it proves there was no conflict between the men and the plaintiff cannot avail. There was no assignment. Plain-

tiff did not nor was it bound to accede to such a metamorphosis."

Similar principles are announced in the other authorities cited above.

We respectfully submit that the Board acted entirely beyond its power under the circumstances disclosed in ordering the Petitioner to recognize the Oil Workers International Union (CIO) as the exclusive bargaining agency at the Refinery and in the Big Muddy Field. This situation, in addition to those pointed out in previous subdivisions of this Brief, emphasizes the impropriety of any exclusive recognition order in the absence of a current election to determine the present bargaining choice of the employees. We believe the order of the Board in this respect to be in conflict with the principles announced by the courts of the other circuits cited above. We cannot find that this court has decided this particular question. It does, however, we submit, involve a federal question of such importance as to justify this court in assuming its supervisory jurisdiction on this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Jurisdictional Statutes

Excerpts from Section 10 (e), National Labor Relations Act, (49 Stat. 449):

> "* * * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

Section 40, Judicial Code, as Amended, (U.S.C., Title 28, Sec. 347):

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

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